Care Manor of Farmington, Inc. *and* New England Health Care Employees Union, District 1199, SEIU, AFL–CIO. Cases 34–CA–5853, 34–CA–5924, 34–CA–5978, and 34–CA–6022

July 8, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

On October 22, 1993, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Care Manor of Farmington, Inc., Farmington, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth the Order.

[1] To the extent that the General Counsel's answering brief constitutes a motion to strike the Respondent's exceptions, the motion is denied. Although the Respondent takes issue with each of the judge's conclusions without citing specific sections of the decision and fails to cite supporting case law, its exceptions are largely credibility based and its brief is specific enough in its citations to the transcript to comply with the Board's Rules and Regulations.

[2] The Respondent excepts, inter alia, to what it characterizes as an ex parte communication between the judge and counsel for the General Counsel. The record establishes that the judge telephoned counsel for the General Counsel shortly after being assigned to hear the instant case in early July 1993 to advise that he would be presiding, and that the judge asked him in turn to contact the Respondent's counsel. Such procedural communications are a permitted practice of judges and are authorized by Sec. 102.130(a) and (b). In the absence of evidence that a prohibited topic was discussed or that some other, prohibited conduct occurred, we agree with the judge that the Respondent's due process rights were not impaired.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Michael Marcionese, Esq., for the General Counsel.
Stuart Bochner, Esq. (Horowitz & Pollack, P.C.), for the Respondent.
Jonathon Neale, Organizer, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me in Hartford, Connecticut, on July 19 and 20, 1993. The consolidated complaint, which issued on April 27, 1993, was based on unfair labor practice charges filed by New England Health Care Employees Union, District 1199, SEIU, AFL–CIO (the Union) on September 24, 1992,[1] and March 17, 1993, in Case 34–CA–5853; November 24, in Case 34–CA–5924; January 11 and April 27, 1993, in Case 34–CA–5978; and February 16, 1993, in Case 34–CA–6022. The consolidated complaint alleges that Care Manor of Farmington, Inc. (Respondent) violated Section 8(a)(1) of the Act by threatening employees with termination if they continued to engage in union activities, interrogated employees regarding their union membership, activities, and sympathies, and promulgated and maintained a rule prohibiting employees from talking about the Union or otherwise engaging in union activities at anytime and anywhere at its facility. The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by removing Mary McGhee from its work schedule on about November 9 and terminating her on November 18, disciplining Ramonita Bonet on December 14 and 24 through a verbal warning and a written warning and suspension, and terminating Genowefa Cwil on January 27, 1993, and Barbara Edge on February 7, 1993. It is further alleged that the discrimination toward McGhee violated Section 8(a)(1) and (4) of the Act because it was in retaliation for her testimony at a representation hearing on behalf of the Union in a related matter.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Connecticut corporation with its office and place of business located in Farmington, Connecticut (the facility), is engaged in the operation of a nursing home. During the 12-month period ending March 31, 1993, Respondent derived gross revenue in excess of $100,000 and purchased and received at its facility goods valued in excess of $5000 directly from points outside the State of Connecticut. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE FACTS

Briefly stated, and where relevant discussed more fully below, in about August, representatives of Local 348S, United Food & Commercial Workers (Local 348S) appeared at the facility soliciting employees to sign authorization cards. Shortly thereafter, the employees contacted the Union, which obtained authorization cards from the requisite number of

[1] Unless indicated otherwise, all dates referred to relate to the year 1992.

employees and filed a petition with the Board on September 10. The unit requested was all nonprofessional employees, excluding all professional employees, guards, and supervisors as defined in the Act. A hearing was conducted on September 22 as well as January 20, 1993. A Decision and Direction of Election issued on February 25, 1993; by Order dated May 13, 1993, the Board denied Respondent's request for review of this decision and an election was conducted on May 12, 1993.

McGhee testified that in about June she and some fellow employees discussed the possibility of getting a union to represent them; nothing came from these discussions. In about August, Local 348S representatives appeared at the facility handing out literature and authorization cards; she signed an authorization card for Local 348S. At this time, she and some fellow employees, including Edge, discussed the possibility of getting a health care union, rather than Local 348S, because: ''We thought it would be more applicable to our needs.'' Fellow employee Susan Collins called the Union and on August 31 Collins told her that she was unable to get involved with it further and she asked McGhee to take the information and call the Union; McGhee agreed to do so. On September 8, McGhee called the Union and spoke to David Pikus, vice president in charge of organizing for the Union. She told Pikus that Local 348S had been organizing at the facility and he said that they should have a meeting of the interested employees as soon as possible. They arranged to meet at McGhee's house the following evening. The following day McGhee spoke to eight or nine employees about the meeting; only three, Bonet, Mark Levesque, and Bill Levesque, attended. At this meeting, they all signed cards for the Union and Pikus gave them additional cards to get signed by their fellow employees.

Beginning the next day, McGhee brought union authorization cards to work with her and distributed them to employees in the breakroom at the facility. She obtained six signed union authorization cards the first day. On the following day, apparently, not a workday for her, she went to the facility to pick up her paycheck and, while she was there, met employees in the parking lot at the facility and obtained additional authorization cards at that time. She collected the signed cards obtained by Bill and Mark Levesque and Bonet, and gave all these cards to Pikus, who filed the petition with the Board. Up until the present time, McGhee has continued attending union meetings and speaking to employees about signing authorization

In addition to the facility, Respondent operates a number of other nursing homes whose employees are represented by the Union. Contract negotiations for these facilities commenced in early October and Pikus asked McGhee to attend these negotiations with him. She attended three negotiation sessions with Pikus and Respondent's representatives, which included Michael Konig, Respondent's president, Respondent's administrator, and Stuart Bochner, Respondent's counsel in the instant matter. Bonet and two or three other employees attended with Pikus as well. Additionally, beginning in about mid-September, McGhee arranged for meetings with herself, interested employees, and union representatives in the parking lot of a restaurant adjacent to the facility. There were about five of these meetings where employees who expressed an interest in the Union were able to speak to representatives of the Union. McGhee testified that this parking lot can be seen from the facility. In about October, the employees began meeting with the union representatives inside the restaurant. In addition, McGhee, Bonet, and three other employees attended the hearing at the Board on September 22; McGhee was the only employee to testify at the hearing. Only Counsel Bochner was present for Respondent at the hearing.

McGhee prepared notices to the employees as a means of notifying them of union meetings. She left these notices on employees' cars in the parking lot and in the breakroom at the facility. At a union meeting in about early November the employees decided that they would wear union buttons to work on November 16. McGhee, and a number of other employees wore these buttons to work on that day. In addition, before starting work that day, McGhee distributed union buttons to employees arriving for work. During that day a ''supervisor'' told her that Ilene Berkon, the administrator, had instructed her to tell her to remove her button. McGhee went to see Berkon, who said that she would have to remove the button or be subject to disciplinary action. McGhee refused and Berkon said that she had a problem with her refusal, but that she would get back to her. Later that day, Berkon told her that it was all right for employees to wear the buttons as long as McGhee went around and made sure that the employees wore their name tags as well. McGhee answered that she wasn't a supervisor, and it was not her job to enforce the dress code.

Bonet testified that in early September, McGhee told her that she had contacted the Union and there would be a meeting at her home on September 9; Bonet attended that meeting and signed an authorization card on that day. In addition, Pikus gave those attending authorization cards to distribute to the other employees. Beginning the following day, Bonet distributed union authorization cards to fellow employees in the breakroom at the facility. She attended the union meetings at the restaurant next door to the facility and kept her fellow employees in the housekeeping department informed of the meetings, sometimes by phone from her home and sometimes at work during break periods. Like McGhee, beginning in about October, she attended the bargaining sessions with Respondent and the Union for Respondent's other facilities. She also informed her fellow employees of the results of these bargaining sessions. In addition, she wore a button to work on November 16.

Cwil, who was employed at Respondent as a CNA, signed a union authorization card on September 10. She attended some union meetings; one was inside the restaurant next to the facility and the other was outside the restaurant. McGhee asked her to come to these meetings. Because of her difficulty with the English language, she could not understand most of what was said.

Edge signed a union authorization card on September 10. In addition, she usually attended the Union's weekly meetings at the adjacent restaurant and made a lot of telephone calls to employees to encourage them to support the Union and to attend union meetings. She also wore a union button to work on November 16.

McGhee worked for Respondent as an LPN commencing June 1991. She began as a per diem employee who fills in on the schedule and is occasionally written on the schedule when needed in advance. In September 1991 she requested, and was granted, a change to a 32-hour position. In January,

at her request, she returned to per diem status. In September, a 32-hour-a-week regular position became available on the 7 a.m. to 3 p.m. shift on the wing that McGhee usually worked on, and McGhee was offered and accepted this ''float'' position and worked there until her termination. This meant that commencing the end of September or the very beginning of October, McGhee worked a regular 32-hour-a-week shift.

Sharyn Vieira, who had been employed by Respondent as the director of nurses from 1988 through October 15, testified that ''sometime in September,'' (she was not certain whether it was early or late September, although her affidavit given to the Board states that it was early September) she was paged several times while she was on one of the units at the facility and was told that Konig wanted to speak to her. He asked Vieira about McGhee's work and Vieira said that McGhee was well respected in the facility, had recently received an above-average evaluation and she had no problem with her work. Konig told her that he felt that McGhee had been organizing for the Union and he didn't want her ''promoting'' the Union at the facility. Vieira did not respond and that was the extent of the conversation. Shortly thereafter, she heard McGhee being paged to the administrator's office. She also testified that prior to McGhee obtaining the float position, she (Vieira) discussed it with Berkon in late September and they agreed that she should be offered the position.

McGhee testified that on that same day she was paged to report to Berkon's office. When she got there, Berkon told her that Konig was on the phone and wished to speak to her. Berkon left and McGhee picked up the telephone in her office. Konig said that they had never met, but that he would make it a point to meet her the next time he came to the facility. He asked her if she was a union representative and she said that she wasn't; that she was just a worker interested in organizing under the Union. Konig then said: ''I won't have that. You can organize on your own time from your own home, but I will not have it on my property.'' He repeated that he would not allow ''campaign organizing on his property.'' McGhee said that she had the right to organize in nonwork areas. Konig said: ''No. All areas are work areas. You are not to come here and do whatever you want. The talk of a Union is very disruptive and I won't have it. If you continue to do it you'll be asked to leave.'' Konig asked if she had any questions. She said that if she had any questions she would direct them to the Board. That was the extent of the conversation. After this conversation, she called Pikus and asked him to file a charge with the Board about the conversation. The initial unfair labor practice charge, dated September 24, alleges that on about September 23, Respondent, by Konig, threatened and harassed McGhee because of her union activities and for testifying at a Board hearing on September 22. The next unfair labor practice charge regarding the discharge of McGhee, was not filed until November 24. On the basis of the date of the initial charge, together with McGhee's testimony, I find that this telephone call, as well as Vieira's prior call from Konig, took place on September 23.

Carol Insogna, who had been employed by Respondent in infection control and as a quality assurance coordinator until December, testified that sometime in September, Berkon called her into her office. Berkon said: ''He wants Mary McGhee out.'' Insogna asked: ''Why? She's an excellent nurse.'' Berkon did not answer, but said, ''Do you know that if you have union activity going on during working hours, that grounds to fire somebody.'' Insogna said: ''Yes, but Mary's not doing that.'' Berkon asked if she knew that for a fact, and Insogna said that she didn't see any union activity. Berkon asked if McGhee was passing out union cards, and Insogna said, ''Not in front of me, not when I've been around.'' Berkon then said: ''Would you ask McGhee for a Union card?'' Insogna said that she wouldn't do it. Berkon asked her if she knew anyone who would ask McGhee for a union card. Insogna, who testified that she was getting a little nervous by that time, suggested Joan Achilli, the assistant director of nurses, and Berkon told her to get Achilli in her office. Berkon made her request to Achilli, who said that she would think about it.

Achilli, who was employed by Respondent from 1989 through December as a day supervisor and assistant director of nursing, testified that she overheard a conversation between Berkon and the then director of nursing, Dolores Levesque, while she was in the assistant director of nursing's office. Although she initially testified that it took place in early October or September, she also testified that it occurred after Vieira had left Respondent's employ, which Vieira had testified was October 15. Achilli testified that she was sitting right next to the wall adjoining the office of the director of nursing and that Berkon and Levesque spoke loudly, and ''I couldn't help but hear.'' Berkon told Levesque that they were not allowed to give McGhee any more time on the work schedule and it was because of McGhee's union activities that Konig did not want her to get any more time. After that, in about November, Berkon and Levesque told her not to schedule McGhee for any more work. When she asked why, they gave her no answer.

During 1992, until she left Respondent's employ on about October 15, Vieira made up the nurses' work schedules, with Achilli's assistance. After Vieira left, Achilli did the schedule for awhile, and then Dolores Levesque began doing the schedules. The schedules for the licensed personnel are for 2-week periods and are usually posted a week or two before the period begins. On November 9, McGhee checked the schedule and saw that there were no hours listed next to her name for the 2-week period beginning November 12. She asked Levesque why she was not scheduled to work on those weeks, and Levesque said that it was because she was a per diem employee and was called only when needed. McGhee said that wasn't true, she was a 32-hour employee as of October 1. Levesque said that she would look into it. She made a similar complaint to Berkon, who also said that she would look into it. On November 11, McGhee called Levesque who gave her a 32-hour schedule for the week of November 12 through 18; McGhee asked about the second week of the schedule and Levesque said that they would see when that time came, and she would call her at that time. McGhee then called Berkon and told her that she felt that she was being discriminated against because she usually received her 2-week schedule in advance. Berkon told her to hold on, and then gave her the schedule from November 12 through 18 and said that she would get back to her about the second week of the schedule.

McGhee worked her regular shift on November 12, 13, 16, and 17. On November 12, she met Levesque, who told her that she had removed her from the schedule because she

heard that McGhee was quitting. McGhee said that if she quit, Levesque would be the first to know. Levesque said: ''Let's end it right here. You're on the schedule.'' Later that day Berkon told her that she had not been put on the schedule because Achilli said that she was quitting. Later that day she asked Achilli if she had told anyone that she (McGhee) was quitting, and Achilli said that she hadn't. McGhee was never assigned to work any day after November 17. On November 18, she called Levesque, who told her that her services were no longer required; Respondent had hired full-time nurses, and since she was a per diem they would call her as needed. McGhee said that she was a 32-hour permanent employee, and Levesque said that she couldn't talk about it and hung up. Later that day, McGhee called Berkon and told her that if she was being terminated for lack of work she wanted a pink slip and would be at the facility the next morning to pick it up. Berkon said ''fine.'' The next day she went to the facility; she was told by Levesque that since she was a per diem employee she would be called as needed. That she was not terminated and they therefore did not have to give her a pink slip. Achilli testified that for the 2-week period beginning November 26, she was short of nurses and had to contact an outside organization to get some ''pool nurses.''

Respondent presented no witnesses as regards this, or any of the allegations. At the commencement of the hearing, counsel for Respondent stated that McGhee was not terminated by Respondent. In his brief, counsel for Respondent states that she, as well as the other alleged discriminatees, was ''terminated for improper activities and for violating recognized and proper employee rules of proper conduct.''

Shortly after McGhee was terminated, a group of about 25 employees (including Edge and Cwil) met at the restaurant adjacent to the facility and went as a group to talk to Berkon about McGhee's termination. They went to her office and were sent to a conference room where they met with Berkon and ''engaged in some open discussion.'' They asked why McGhee was terminated, but were never given a reason. In addition, on December 20 about 25 employees (including McGhee and Edge) stood on the street adjoining the facility and distributed leaflets to those entering or leaving the facility.

Bonet had been employed by Respondent in the housekeeping department since 1990. As stated above, she attended the initial union meeting at McGhee's house on September 9, signed a card at that meeting, and subsequently distributed union authorization cards to other employees. She also wore a union button to work on November 16 and attended all the latter union meetings, and the Union's negotiations with Respondent for its other facilities. She kept the housekeeping employees informed of the results of these meetings either by phone or during lunch breaks; on some of these occasions her supervisor, Raquel Reyes, was present. On December 16, she was given a written verbal warning, dated December 15, stating:

> Ramonita Bonet violated the 30 day absenteeism policy, which states if any employee within 30 days calls out of work when scheduled to work twice or more is subject to disciplinary actions. Dates in question are November 19–December 11.

Bonet could not specifically recall the absences, but she believes that she was sick with asthma on 2 days during this period, and on each of those days called in sick. When her supervisor, Raquel Reyes, gave her the warning she said that it had been ordered by Berkon. Bonet testified that she knows of another employee, Blanca Diaz, who ''used to call out all the time for any reason that she have problem with a babysitter or whatever. She never got a warning till late December.''

On December 24, she was given two warnings, one dated December 22 and labeled ''written warning,'' and one dated December 24 and labeled ''final warning.'' The earlier one states: ''Type C Minor #3, Unsatisfactory work performance,'' and the second states: ''Type A (Major) #16. Blatant insubordination in A&B wing nurses' station.'' She testified that the complaint on the earlier one was that when Berkon was doing rounds, she saw dirt on the floor. Later, when they did rounds in the afternoon, they said that they saw the same spot. She testified that on the day in question she left work early for a doctor's appointment, and could not complete her regular work assignments. On that occasion she told Berkon that what she could not complete, she would complete the following day. As to whether this allegation was true, she testified: ''I guess, because I didn't see what she did.'' The other warning was for an incident that occurred on December 24; on that day she was scheduled to do ''a major cleaning'' in the nurses station, which usually occurs a few times a year. She testified that the normal routine for these cleanings is for the room to be emptied before the cleaner arrived because they use water and chemicals to clean the room and the medication and other items stored in the room could be damaged or contaminated if not first removed. She told the nurse in charge to remove the items so that she could clean the room and the nurse told her that she couldn't do it because there was no place to put everything. She told her supervisor that this was not the way it was supposed to be done, that the room was to be empty before they began, to prevent damage to the contents. However, she could not remember what, if anything, she did in the room, although she thought that she assisted another employee in cleaning the room. At about 1 p.m. that day, she was told that she was suspended for the remainder of the workday, which would have ended at 4 p.m. When she was leaving she was reminded by Reyes that she had to report to work the following day, Christmas Day: ''If you don't show tomorrow, you're fired.'' She did work the following day. Prior to these incidents, Bonet had received two written ''verbal warnings.'' The first, dated dated January 29, 1991, was a violation of policy of not maintaining an adequate linen flow. The other one, dated June 22, was also a violation of policy for failing to attend a scheduled infection control lecture.

Cwil was employed by Respondent as a CNA beginning September 1. As stated above, she signed a union authorization card on September 10 and attended two union meetings, one in the adjacent restaurant and one in its parking lot. She also participated in the demonstration against McGhee's discharge that resulted in the meeting with Berkon. In this meeting, she sat a few feet from Berkon. She was employed by Respondent until late January 1993. At that time she was called to a meeting with Levesque and her supervisor, Harry Bowen, Respondent's assistant director of nursing. Levesque

gave her a ''pink piece of paper'' and told her that the facility was being taken over by the State and the work would be too hard for her, so she would have to leave, even though she was a good worker and a nice person. Bowen said that if she found another job he would give her a good reference. She begged them to let her stay because it was her first job since she came from Poland and ''was taking it very seriously.'' They did not relent and she left.

Cwil testified that prior to the last week or two of her employment at the facility ''all the time I was complimented.'' During the last week or two there were complaints about her work: one complaint, about a day before she was fired, was that while she was out to lunch one of her patients had a wet diaper. She responded that it couldn't be, because she checked all the diapers when she left for lunch and they were dry. Levesque responded that she was lying. In addition, during the final week of her employment, Bowen complained that she was not putting undershirts on the patients. She told Bowen that the reason for this was that she couldn't find undershirts.

Edge was employed by Respondent as an LPN from February 1990 until February 1993. She was involved in the initial union discussions at the facility following the appearance of the Local 348S representatives. She signed a union authorization card on September 10 and attended weekly meetings at the restaurant adjacent to the facility. From September through February 1993 she notified employees, in person and by phone, on her shift about the progress the Union was making and the schedule of union meetings. She wore a union button along with other of the employees on button day and was one of the employees who participated in the demonstration protesting McGhee's discharge that resulted in the meeting with Berkon. She also participated in the demonstration and leafletting outside the facility on December 20.

Edge's final day of employment with Respondent was January 29, 1993. She had previously requested a 1-week vacation, which request was granted, and she was scheduled to return to work on Monday, February 8. At about 9 p.m. on Sunday, February 7, 1993, she received a telephone call at home from Levesque, who told her that her services were no longer required at the facility. Levesque asked her if she had received a certified letter to that effect from Respondent. She said that she had not and asked Levesque why she was being fired. Levesque gave her three reasons at that time: that she had left her ''med cart'' open, that she did not know the location of a CNA, and that she had not performed treatment on a resident. Edge asked her to be more specific because it came as a total surprise to her. Levesque said that she would not discuss it with her until she received the certified letter. On February 9, she received a certified letter from Respondent postmarked February 8, 1993. She never discussed the letter with any representative of Respondent. She only returned to the facility to pick up her final paycheck and, by then, Levesque was no longer employed by Respondent.

The first two pages of this letter is a communication memo written by Levesque, dated February 1, 1993. Edge testified that prior to leaving for vacation she was never informed that any of the incidents cited in this letter would be the basis of disciplinary action. The first incident referred to in the communication memo refers to the ''med cart'' incident. A med cart is a rolling cart with safety lock drawers containing the residents' medicines. The nurses use these carts to transport the medicine to the residents' rooms. Apparently, on the day in question, state inspectors were at the facility and counseled Edge that she should always keep the cart within sight or hearing. At one point, while giving medication to a resident, it was out of her sight. Levesque's communication memo states:

> During survey Barbara was ''picked up'' by the surveyor for not having her med cart in view. That same day, while making rounds, I found Barbara at a patient's bedside, back to the door and med cart out of her view. I counseled her that she must keep sight of the med cart. She responded that she had been surveyed . . . I responded that's fine, but you need to keep your med cart in view. She appeared irritated. I later learned that she had been picked up by surveyor. She had made no attempt to correct this problem.

Edge testified that the situation referred to in this memo occurred in early January. The inspector from the State saw her while she was briefly behind a curtain in the resident's room and told her to keep the cart within view or hearing. When Levesque saw her, she was in the room, within 6 feet of the cart. She does not recall Levesque commenting on the situation at the time.

The next incident referred to in the memo states:

> On another occasion I went to AW looking for a CNA—I asked Barbara the whereabouts of this CNA. She responded: ''I don't know. They're big enough, they know what they have to do.'' I told her that she was a unit manager and that she needed to supervise staff, direct their work and know their whereabouts.

Edge testified that, as best as she could recollect, this incident occurred in about December. Levesque came by and said that she was looking for a CNA whose name Edge, at this time, could not recollect. Edge, who was in the midst of giving morning medication to her 30 residents, said that she didn't know where she was, but would be happy to page her. That was the extent of the incident, and it was never mentioned again until the telephone call on February 7, 1993.

The memo next states:

> A resident refused his TX—he is confused and unable to make decisions for himself. She said he had the right to refuse. She did not document that she explained the pros and consequences of not doing the TX.

Edge testified that she had no idea what this referred to, and she was never previously spoken to about this. The memo next states:

> Barbara has shown resistance following policies that need to be in place to increase efficiency of this facility and the care to the residents. i.e., giving out med trays. Not taking responsibility re: staff whereabouts. Not having positive input re toileting residents, saying, ''This patient has always been incontinent so why toilet.''
>
> There are specific c/o from family re lack of—[unreadable] after conversations with Barbara.

> Because of these numerous incidents your services can no longer be required.

Edge testified that the ''policies'' Levesque referred to above relates to the residents' meal trays. When Levesque began working at the facility in about November she established a rule that the LPNs must hand these trays to the residents. Edge testified that the State requires that all morning medicine be dispensed to the residents between 8 and 10 a.m. It is during this period that the CNAs distribute the meals to the residents. In November, Edge told Levesque that she had a heavy medical schedule in the morning and she felt that the CNA did not need her assistance with the meals. As to the ''toileting'' problem referred to in the memo, she testified that it probably relates to a situation in about early December with a resident with an open area of the buttocks. Levesque disagreed with her treatment method, and she complied with Levesque's request. Nothing was ever said about the incident again. As to the final allegation of the memo of complaints from family, Edge testified that she is not aware of any such complaints.

In addition to Levesque's communication memo, the letter contains a communication memo, dated February 5, 1993, from Bowen, together with a short note dated January 25, 1993, from Edge to Bowen. Without going into too much detail, it involves the question of whether one of Edge's residents should be sent to the hospital. Edge testified that one of these situations involved another nurse who failed to note a doctor's orders on Christmas Eve. She wrote a memo to Bowen on January 25, 1993, when the situation was called to her attention. Neither of these situations was further discussed with her prior to her receipt of this letter from Respondent on February 9, 1993.

As stated above, Edge had been employed by Respondent since February 1990. Her most recent evaluations were dated March 1991 and April 1992. In the earlier one, she was rated excellent in one category, above standard in four categories, and standard in two categories. Her overall evaluation is given as above standard. Her April 1992 evaluation gives her two excellents, and five above standards, with, again, an above standard overall evaluation. She received a 7.5-percent increase as a result of this evaluation. Respondent employs medication error reports which, as the name indicates, reports errors in medication by the employee. The parties stipulated that, during the course of her employment, Edge received three medication error reports, dated April 16 and June 24, 1990, and August 12, 1992. In February 1991, she received a suspension and final warning for improper administration of medication. Vieira, who gave her that suspension, testified that Edge was a very good nurse who gave good care and got along well with the staff, residents, and families. Achilli testified that Edge was an excellent nurse who gave excellent patient care.

IV. ANALYSIS

Prior to discussing the merits of the allegations contained in the consolidated complaint, it is necessary to discuss some procedural allegations contained in the brief of counsel for Respondent. Counsel makes two claims, that I improperly denied him an adjournment of the case and that he was denied the opportunity to cross-examine witness McGhee. As to the first claim, the consolidated complaint issued on April 27, 1993. As is true of all complaints, after stating that the hearing would begin on July 19, 1993, at 11 a.m.,[2] it states ''and on consecutive days thereafter.'' At the commencement of the hearing on July 19, 1993, for the first time, Counsel Bochner stated that he had a conflicting court appearance on the following day and requested an adjournment of the hearing so that it would continue at a later time. Counsel Bochner stated that he was unaware that the hearing would require more than 1 day of hearing. General Counsel opposed this request that the hearing be continued at a later time. I denied Counsel Bochner's request for an adjournment of the case at the conclusion of the first day of hearing. I noted that the consolidated complaint alleged that five employees had been discriminated against in violation of Section 8(a)(3) of the Act and that Respondent violated Section 8(a)(1) of the Act as well. It is obvious that a complaint of this magnitude could not be completed in 1 day. Additionally, the consolidated complaint issued 4 months earlier, but Counsel Bochner waited until the hearing had opened before making his request that the hearing be adjourned and never stated a reason why he hadn't made his adjournment request earlier. Finally, Counsel Bochner, at the hearing and in his brief, alleges that there were some ex parte communications between General Counsel and myself regarding the scheduling of the hearing. As stated above, the consolidated complaint issued on April 27, 1993, and scheduled the hearing to begin on July 19, 1993, at 11 a.m., the date and time that the hearing did begin. I was assigned the case approximately 2 weeks earlier at which time I called General Counsel, told him that I was assigned to hear the case and to notify counsel for Respondent of that fact. This allegation by Counsel Bochner that I had ex parte communications with General Counsel regarding scheduling of the case is simply not true. As the case began as scheduled 4 months earlier I am uncertain as to what these communications would have been. I therefore reject this allegation. The case continued on the second day, August 20, 1993, and Counsel Bochner appeared on that day. At the conclusion of General Counsel's case, Counsel Bochner presented no witnesses on behalf of Respondent. I therefore reject this argument of counsel for Respondent.

Counsel Bochner also alleges that he was improperly denied the opportunity to cross-examine witness McGhee. McGhee testified as a witness for General Counsel. At the conclusion of her testimony, General Counsel gave Counsel Bochner McGhee's affidavits pursuant to the Jencks' Act, 18 U.S.C. § 3500. I initially gave counsel 20 minutes to read over the affidavits and, at his subsequent request, I gave him an additional 5 minutes. When I requested that he begin cross-examination of witness McGhee, Counsel Bochner refused, saying that he needed additional time so that he could write out the contents of McGhee's affidavit, claiming that it established that she committed perjury in her testimony in the representation hearing. Counsel for General Counsel objected to this use of the affidavit, and I informed Counsel Bochner that, under Jencks, the affidavit is to be used solely for purposes of cross-examination. I informed him that, if that were his true purpose, he could make a Freedom of In-

[2] Apparently, it is customary to schedule Monday hearings, such as the instant matter, to begin at 11 a.m. to allow travel time for the judge.

formation Act request to obtain the affidavit or that he could attempt to cross-examine McGhee about the alleged untrue testimony, or could attempt to move the affidavit into evidence. He refused all these suggestions and, when I again told him to begin cross-examination he refused and, instead, continued to copy the contents of the affidavit. I then excused witness McGhee.

It seems somewhat disingenuous of Counsel Bochner to allege that I deprived him of the right to cross-examine McGhee when I gave him that opportunity on a number of occasions and, instead, he refused my direction and acted improperly in copying the affidavit, rather than using the affidavit to cross-examine McGhee, as is provided by Jencks. Additionally, even after acting improperly, he could have retrieved the right to cross-examine McGhee by subpoening her, which he failed to do. It should be noted that although Counsel Bochner refused to follow my directions to begin cross-examination of witness McGhee, his conduct was not so contemptuous as to warrant further action against him pursuant to the Board's Decision in *Advance Waste Systems*, 306 NLRB 1020 (1992).

It is initially alleged that Respondent, through Konig, on about September 23, violated Section 8(a)(1) of the Act by threatening employees with discharge if they continued to engage in union activities, interrogated employees regarding their union activities, and promulgated and maintained a rule prohibiting employees from talking about the Union, or engaging in other union activities, at anytime, anywhere, in the facility. The testimony in support of these allegations comes from McGhee and Vieira, each of whom I found to be credible witnesses. The testimony is additionally credible because the events occurred on September 23, a day after McGhee testified at the representation hearing for the Union. The fact that no evidence was presented by Respondent to contradict their testimony further supports this finding. Vieira testified that after Konig talked to her on the phone about McGhee, she heard McGhee being paged to Berkon's office. McGhee testified that she was told to take a telephone call in Berkon's office. When she picked up the phone, it was Konig, who asked her if she was a union ''representative.'' Although it is not clear whether he was being sarcastic in using this word or whether he used a different word like ''supporter,'' this question, by the president of Respondent to an employee seated in the administrator's office, clearly constitutes unlawful interrogation and violates Section 8(a)(1) of the Act. When McGhee answered that she was simply an employee interested in organizing under the Union, Konig answered: ''I won't have that. If you continue to do it, you'll be asked to leave.'' I find that this constitutes a threat of discharge if McGhee continued to engage in union activities and therefore violates Section 8(a)(1) of the Act. Konig then told her: ''You can organize on your own time from your own home, but I will not have it on my property.'' When McGhee objected that she had the right to organize in nonwork areas, Konig answered: ''No; all areas are work areas.'' Konig was therefore prohibiting organizing activity in both nonwork areas and on nonworking time. This is presumptively invalid under *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). As Respondent presented no evidence to dispute this, I find that the promulgation and maintenance of this rule, as stated to McGhee on September 23, violated Section 8(a)(1) of the Act.

The remaining allegations involve alleged 8(a)(1) and (3) violations; the allegation regarding McGhee's discharge involves Section 8(a)(1) and (4) as well because of her testimony at the representation hearing on September 22. McGhee began working for Respondent in June 1991, first as a per diem employee, then a regular 32-hour employee, then, at her request, back to per diem status, and then, effective October 1, she returned to regular 32-hour status. McGhee was obviously the leader in the Union's attempt to organize the employees at the facility: she called the Union initially and arranged to have the first meeting at her house and notified employees of the meeting. In addition to attending subsequent meetings and the Union's negotiations for other of Respondent's facilities, she attended the Board's representation hearing on September 22, and was the only employee to testify on behalf of the Union. If there was any question about Respondent's knowledge of these activities, and attitude toward it, this was quickly dispelled the following day when Konig called Vieira, asked about McGhee's work, and told her that he didn't want McGhee engaging in union activities in the building. At the conclusion of that discussion, Konig called McGhee and engaged in the 8(a)(1) violations discussed above.

McGhee worked, at least, 4 days 32 hours a week through November 9. On that day she saw that she was not scheduled to work on the 2-week schedule beginning November 12. When McGhee called Levesque and Berkon about this, she was given 32 hours of work for the week of November 12, but no work thereafter. Levesque's first explanation for her lack of assignments was that she was a per diem employee, which is not correct. Subsequently, Levesque said that she was not scheduled because she heard that McGhee had quit her employment with Respondent, also not true. On the following week when McGhee went to pick up her pink slip, Levesque told her that since she was a per diem employee she would be called as needed, therefore she was not terminated and would not be given a pink slip. This is further complicated by the fact that at the hearing counsel for Respondent stated that McGhee was not terminated, yet in his brief he states that she was terminated.

In addition to these shifting positions regarding McGhee's termination, there is ample evidence of animus toward her and her activities on behalf of the Union. The September 23 comments by Konig to Vieira and McGhee are certainly evidence of animus on Respondent's part. Further, in September, Berkon told Insogna that Konig wanted McGhee ''out,'' and asked her to spy on McGhee to see if she was engaged in union activities. Shortly thereafter, Achilli overheard Berkon telling Levesque that they were not to give McGhee any more work, on Konig's orders, and it was because of her union activities. Shortly thereafter, they told Achilli not to schedule McGhee for any more work; no reason was given. Under *Wright Line*, 251 NLRB 1083 (1980), General Counsel has clearly satisfied his burden of establishing that McGhee's union activity was a motivating factor in Respondent's decision to terminate her. The animus, shifting positions, and Achilli's testimony of the conversation she overheard and Berkon's direction to her not to assign work to McGhee, leaves no doubt that this burden was satisfied. It is therefore Respondent's burden to establish that the same action would have taken place even in the absence of her union activities. Respondent produced no evidence in this re-

gard and none appears in the record. I therefore find that Respondent removed McGhee from its work schedule on about November 9, and terminated McGhee on about November 18, in violation of Section 8(a)(1) and (3) of the Act. In addition, as the animus began on September 23, a day after McGhee testified at the representation hearing, I find that her termination and removal from the work schedule also violates Section 8(a)(1) and (4) of the Act.

Bonet received a verbal warning on December 15 and two warnings and a 3-hour suspension without pay on December 24. Bonet, who began her employment with Respondent in 1990, attended the union meeting at McGhee's house on September 9, at which time she signed a union authorization card, wore a button to work on November 16, and distributed cards to other employees and notified them of the union meetings. In addition, she attended all the union meetings and the Union's negotiations with Respondent for its other facilities. Bonet's situation is not as obvious as McGhee's: here there is no overt animus, shifting explanations, or ''smoking gun.'' However, the evidence establishes that Respondent was aware of her support for the Union. She wore the union button on November 16, attended the negotiations along with McGhee, a few other employees, and the union representatives, and spoke to her fellow employees about the Union's actions, sometimes in the presence of Reyes, her supervisor. In addition, Reyes told her that Berkon had ordered her to give her, at least, the first warning. I therefore find that General Counsel has sustained his burden under *Wright Line*. The ultimate question therefore is whether Respondent has satisfied its burden that it would have given her the warnings and suspended her even absent her union activities. I find that it has not. Respondent presented no witnesses. The evidence establishes that she has been employed by Respondent since 1990. Prior to December 16, she received two verbal warnings: one in January 1991 and the second on June 22. She was given the December warnings and suspension within a month or two of exhibiting her support for the Union and about a month after McGhee's unlawful termination. In addition, at least the first warning was directed by Berkon, who was directly involved in McGhee's unlawful termination. Finally, the incidents, together with the other evidence in the hearing, convinces me that Respondent used, or created, this incidents as a pretext to suspend Bonet and give her these warnings. I therefore find that the warnings and suspension of Bonet violate Section 8(a)(1) and (3) of the Act.

Cwil was employed by Respondent for a short period, but during this period she signed a union card and attended two union meetings. More importantly, in about late November, she was one of the employees who met with Berkon to protest McGhee's termination. This occurred about 2 months prior to her discharge and, until that time, her work had never been criticized. When she was terminated in late January 1993, she was told that the reason was that the facility was being taken over by the State and the work would be too hard for her. General Counsel has sustained its burden on the basis of this testimony. The only testimony of difficulties that Cwil encountered at work was her testimony that in the final week or two of her employment she received complaints regarding her work; one involved a resident who, allegedly, had a wet diaper and the other complaint was that she was not putting undershirts on the residents. Cwil had recently emigrated from Poland. She testified with much sincerity and credibility that this was her first job in the United States and she was taking it very seriously. Respondent's lack of a defense and the transparent nature of the reason that Respondent gave her for firing her, convinces me that the Respondent has not satisfied its burden under *Wright Line*. The termination of Cwil, on about January 27, 1993, therefore violates Section 8(a)(1) and (3) of the Act.

Edge had been employed by Respondent since February 1990. She was involved in the initial union discussions in the summer, signed a union card, and attended the weekly union meetings. In addition, she notified her fellow employees of union meetings and union progress at the facility. There can be no question that Respondent was aware of her union sympathies because she wore a button to work on button day, attended the meeting with Berkon to protest McGhee's termination, and participated in the demonstration and leafletting at the facility on December 20. On the night before Edge was to return to work after a vacation, she received a call from Levesque, who told her that she was terminated. When she asked for the reason she was given three reasons and told that the reasons were set out in a letter that Respondent sent to her. The evidence establishes that this letter was not sent to Edge until the following day. To refer to this situation as ''suspicious'' is to give Respondent the benefit of the doubt. General Counsel has clearly sustained his burden under *Wright Line*.

The evidence convinces me that Respondent has not sustained its burden under *Wright Line*. The reasons given for her discharge are so obviously pretextual that I find it unnecessary to evaluate the allegations against Edge. What is clear is that the first she learned of these allegations and her termination was the night before she was scheduled to return to work after a 1-week vacation. Levesque mentioned three incidents and a letter that Edge should have received detailing these incidents. In fact, the letter was not sent out until the following day and contained additional incidents not mentioned by Levesque. In addition, the letter refers to incidents that occurred in November, December, and in January 1993, as well as alleged incidents that she was unaware of, and she had never previously been counseled about any of these incidents. I therefore find that by terminating Edge on February 7, 1993, Respondent violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), (7), and (14) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act in the following manner:

(a) By interrogating its employees regarding their union activities and sympathies.

(b) Threatening to discharge its employees if they continue to engage in union activities.

(c) Promulgating and maintaining an unlawful no-solicitation rule for employees at the facility.

4. Respondent violated Section 8(a)(1) and (3) of the Act in the following manner:

(a) Removing McGhee from its work schedule on about November 9, and terminating her on about November 18.

(b) Giving written warnings and a 3-hour suspension to Bonet on December 14 and 24.

(c) Discharging Cwil on about January 27, 1993, and Edge on about February 7, 1993.

5. Respondent violated Section 8(a)(1) and (4) of the Act by removing McGhee from the work schedule and terminating her on about November 18, 1992.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent unlawfully terminated McGhee, Cwil, and Edge I shall recommend that Respondent be ordered to offer each of them immediate reinstatement to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to expunge from its files any references to these terminations. I shall also recommend that Respondent be ordered to make them whole for any loss they suffered as a result of the discrimination against them. Bonet was suspended for 3 hours and that is the amount of backpay due her. In addition, I shall recommend that the warnings she received in December be expunged from her file. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Care Manor of Farmington, Inc., Farmington, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees that if they continued to engage in union activities they would be fired.

(b) Interrogating its employees about their union activities.

(c) Promulgating and maintaining a rule prohibiting its employees from talking about the Union or engaging in union activities anywhere and at any time at the facility.

(d) Discharging, terminating, suspending, or giving warnings to its employees in retaliation for their activities on behalf of the Union or for giving testimony at a Board proceeding.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer McGhee, Cwil, and Edge immediate reinstatement to their former positions of employment or, if those positions are no longer available, to substantially similar positions without prejudice to their seniority or other rights and privileges, and make them whole for the loss they suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Make whole Bonet by paying her for her 3 hours lost due to the unlawful suspension, with interest.

(c) Expunge from its files all mention of these unlawful terminations, warnings, and suspension and notify McGhee, Bonet, Edge, and Cwil that this has been done and that evidence of this unlawful activity will not be used as a basis of future actions against them.

(d) Preserve and, on request, make available to the Board or its agents for examination or copying all records and documents necessary to analyze and determine the amount of backpay owed to these employees.

(e) Post at its facility in Farmington, Connecticut, copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees regarding their activities on behalf of New England Health Care Employees Union, District 1199, SEIU, AFL–CIO (the Union) or any other labor organization.

WE WILL NOT threaten our employees with discharge for engaging in activities on behalf of the Union.

WE WILL NOT promulgate and maintain rules prohibiting employees from soliciting support for the Union at anytime or anywhere at our facility.

WE WILL NOT discharge, terminate, suspend, warn, or otherwise discriminate against our employees because of their support for, or activities on behalf of, the Union or for giving testimony at Board proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL make whole Mary McGhee, Ramonita Bonet, Genowefa Cwil, and Barbara Edge, with interest, for any loss of earnings they suffered as a result of our discrimination against them, and WE WILL offer McGhee, Cwil, and Edge full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges.

WE WILL expunge from our files any reference to the terminations, suspension, and warnings given to these employees and WE WILL notify them in writing that this has been done and that evidence of this unlawful action will not be used as a basis for future action against them.

CARE MANOR OF FARMINGTON, INC.